Supreme Court, U.S.
FILED
NOV 13 2001
CLERK

(12)

No. 00-1073

In The

Supreme Court of the United States

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011, a/k/a OWASSO PUBLIC SCHOOLS; DALE JOHNSON, individually and in his official capacity as Superintendent; LYNN JOHNSON, individually and in her official capacity as Assistant Superintendent; RICK THOMAS, individually and in his official capacity as Principal,

Petitioners,

v.

KRISTJA J. FALVO, as parent and next friend of her minor children, ELIZABETH PLETAN, PHILIP PLETAN, and ERICA PLETAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR PETITIONERS

JERRY A. RICHARDSON
Counsel of Record
KAREN L. LONG
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

1. Congress Did Not Grant a Private Right of Action to Enforce FERPA Pursuant to 42 U.S.C. § 1983 1

2. FERPA Was Intended to Apply Only to Institutional Records and Not to the Scores Recorded on Routine Homework Papers, Quizzes, and Tests 2

   A. The Text of the Statute 3

   B. The Legislative History 10

3. The Analysis of the Tenth Circuit Needlessly Burdens Legitimate Educational Practices in Ways Never Intended by Congress 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Belanger v. Nashua, New Hampshire, Sch. Dist, 856 F. Supp. 40 (D. N.H. 1994) 14

Epperson v. Arkansas, 393 U.S. 97 (1968) 19

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 2

Kolstad v. American Dental Assn., 527 U.S. 526 (1999) 1

Oklahoma Tax Comm. v. Potawatomi Tribe, 498 U.S. 505 (1991) 2

Teague v. Lane, 489 U.S. 288 (1989) 2

Wood v. Strickland, 420 U.S. 308 (1975) 19

STATUTES

20 U.S.C. § 1232g(a)(2) 9, 14

20 U.S.C. § 1232g(a)(4)(A) 3

20 U.S.C. § 1232g(a)(4)(B)(i) 8

20 U.S.C. § 1232g(b)(4)(A) 9, 10

20 U.S.C. § 1232g(d) 15

42 U.S.C. § 1983 ..... 1, 2

LEGISLATIVE MATERIALS

120 Cong. Rec. (1974):

p. 9,633 13

p. 14,850 12

TABLE OF AUTHORITIES – Continued

Page

pp. 39,858-39,859 11

p. 39,862 ..... 12, 14

MISCELLANEOUS

The American Heritage Dictionary of the English Language (4th ed. 2000) 3

Daniel R. Dinger, *Johnny Saw my Test Score, so I'm Suing my Teacher: Falvo v. Owasso Independent School District, Peer Grading, and a Student's Right to Privacy under the Family Education Rights and Privacy Act*, 30 JOURNAL OF LAW & EDUCATION 575 (October 2001) 15, 16, 17, 18, 19

Perry A. Zirkel, *A D-Grading Experience?*, PHI DELTA KAPPAN, November 2000, at 253 18

1. Congress Did Not Grant a Private Right of Action to Enforce FERPA Pursuant to 42 U.S.C. § 1983.

Respondent points out that the question of whether Respondent could bring an action against Petitioners under 42 U.S.C. § 1983 was not raised in the question presented in the Petition for Certiorari and was not addressed in the Brief for Petitioners. Respondent therefore urges that such issue should not be addressed by the Court. Brief of Respondents on the Merits, p. 2. Respondent then devotes the next seven (7) pages of her brief to arguing that the Court should rule that FERPA *is* actionable under 42 U.S.C. § 1983. *Id.*, pp. 2-8.

Petitioners acknowledge that their focus throughout this litigation has been on the merits of Respondent's FERPA claim and not on the availability of a remedy under Section 1983. However, as the issue of whether FERPA is enforceable under Section 1983 has been fully briefed by *Amici* supporting Petitioners the National School Boards Association, *et al.*, The National Education Association and the American Federation of Teachers, AFL-CIO, and The Reporters Committee for Freedom of the Press and the Student Press Law Center, and as Respondent and *Amicus* supporting Respondent Eagle Forum Education & Legal Defense Fund have likewise briefed the question, the Court should determine this issue.

This Court has on a number of occasions considered and ruled on issues that were not raised in the petition for certiorari "because the issues were so integral to decision of the case that they could be considered 'fairly subsumed' by the actual questions presented." *Kolstad v.*

American Dental Assn., 527 U.S. 526, 540 (1999), *quoting Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 37 (1991) (Stevens, J., dissenting) (citing cases). The Court has addressed issues not specifically raised in the petition for certiorari not only when the parties have briefed the issue, *Oklahoma Tax Comm. v. Potawatomi Tribe*, 498 U.S. 505, 512 (1991), but also when the issue has been raised only by an *amicus*. *Teague v. Lane*, 489 U.S. 288, 300 (1989).

Because both the parties and their *amici* have raised and addressed this issue, and because this issue is "fairly subsumed" within the question on which this Court granted certiorari, the Court should also determine whether Congress, in enacting FERPA, established a right of action enforceable under 42 U.S.C. § 1983.

2. FERPA Was Intended to Apply Only to Institutional Records and Not to the Scores Recorded on Routine Homework Papers, Quizzes, and Tests.

FERPA was intended to apply only to institutional records, especially those records that follow a student through his or her educational career and might affect the student's employment or post-secondary school educational opportunities. FERPA was never intended to interfere with the way in which teachers conduct day-to-day classroom activities. As the four Tenth Circuit judges who dissented from the denial of Petitioners' petition for rehearing *en banc* correctly observed, "[d]efining 'education records' to include 'grades which students record on one another's homework and test papers and then report to the teacher' . . . is a vast expansion of the actual words

of the statute, and [is] unsupported by the legislative history." (Petition for Certiorari, App. D-2-3).

A. The Text of the Statute.

The plain language of the statute reflects that Congress did not intend for the scores recorded on routine homework papers, quizzes, and tests to be protected as "education records" under FERPA. In defining education records as "records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are *maintained* by an educational agency or institution or by a person acting for such agency or institution," 20 U.S.C. § 1232g(a)(4)(A) (emphasis added), Congress clearly intended the word "maintained" to supply a substantive component to the definition. Based on the plain meaning of the word "maintain" ("to keep in an existing state; preserve or retain," *The American Heritage Dictionary of the English Language* (4th ed. 2000)), Congress was limiting "education records" to those "records, files, documents, and other materials" that are *kept*, *preserved*, or *retained* by an educational agency or institution. The most logical way to give effect to this limitation is by applying FERPA only to the *institutional records* of an educational agency or institution.

The Tenth Circuit rejected this analysis, concluding that because *at least some* of the scores on peer-graded homework papers, quizzes, and tests are ultimately recorded in the teacher's grade book, those scores are "maintained" once they are recorded in the teacher's grade book. (Petition for Certiorari, App. A-21). But because the record establishes that the disclosure of the

score on a peer-graded paper occurs *before* the teacher ever records the scores in a grade book, the lower court was forced to take its analysis one step further and find that scores are maintained "at the more preliminary stage when one student simply writes the grade of a fellow student on homework and test papers." (*Id.* at A-24). The court concluded that such peer-graded scores are education records even if the score is never recorded in the teacher's grade book. (*Id.* at A-24, n.11).

Significantly, Respondent makes no attempt to defend the second step of this analysis. Instead, Respondent focuses exclusively on the grades that get recorded in the grade book and appears to concede – directly contrary to the Tenth Circuit's decision – that peer-graded student work is *not* an education record if the score thereon is not recorded in the teacher's grade book. Brief of Respondents on the Merits, p. 18. *Amici* Council of Counseling Psychology Training Programs, *et al.*, expressly acknowledge this point, stating at p. 18 of their brief that "FERPA is violated only if the teacher, without parental consent, shares the *grade book information* about one child with someone not eligible to receive it." (Emphasis added).[1]

---

[1] It seems indisputable that the mere fact that other students may have knowledge of information contained in a student's education records will *not* result in a violation of FERPA unless the information was disclosed *from the education records* and did not come from another source. Otherwise, FERPA would be violated when students see a classmate commit a serious violation of the school's disciplinary code and accurately conclude, based on that student's absence from school the following day, that he has been suspended. In that

By conceding that scores are not "maintained" within the meaning of FERPA unless they are ultimately recorded in a teacher's grade book, Respondent essentially adopts a position akin to that formerly taken by the Family Policy Compliance Office.[2] Because the FPCO expressly concluded, even under its previous, broader interpretation of "education records," that the peer-grading practice at issue in this case did not violate FERPA, Respondent's last-minute shift toward the FPCO's former position is puzzling, to say the least.[3]

---

situation, the suspended student's education records do, in fact, reflect that he has been suspended, but *the source* of his classmates' knowledge of that information was clearly *not* the suspended student's education records. By the same token, the disclosure of grades on homework papers that ultimately may be recorded in a teacher's grade book does not violate FERPA, because the disclosure comes *from the homework paper* rather than *from the teacher's grade book.*

[2] The United States has noted in this case that the FPCO had previously expressed the view that "education records" includes student work *after* it has been collected by the teacher. The United States recognized that such position is overly broad and is not supported by the text or legislative history of the statute. Brief for the United States as Amicus Curiae Supporting Petitioners, p. 11, n.6.

[3] In addition to changing her legal theory, Respondent also attempts to revise the undisputed facts on which summary judgment was granted. Respondent repeatedly emphasizes that some students revealed their scores to the entire class by "calling out" their scores instead of reporting the scores in confidence. Respondent asserts that "calling out" grades in this manner has no pedagogical value. Brief of Respondents on the Merits, p. 9. Yet the Tenth Circuit expressly acknowledged that it did not even reach the method of reporting the grades because a disclosure occurs at the earlier stage when one student grades

Moreover, by focusing solely on scores that end up in the teacher's grade book, Respondent illustrates a second flaw in the lower court's analysis: no "disclosure" of an education record occurs when one student grades another's paper if neither student knows whether the score placed on such paper is actually recorded in the grade book. Suppose a teacher assigns a 10 point homework paper for each day of the week and, through peer grading, the following five scores by one student are "revealed" to his classmates in one week: 8, 9, 10, 7, and 8. Assume the teacher records only two of the five daily grades in her grade book and the class does not know

---

the work of another. (Petition for Certiorari, App. A-21, n.10). The court stated:

> [Falvo] testified that the calling out of her children's grades did not really matter because the prior act of one student grading another's paper itself constitutes a disclosure. As a consequence, this court need not determine whether the challenge to the practice of calling out grades in class is resolved by the option which the School District provided to Falvo's children to privately report their own grades to the teacher.

(*Id.* at A-3-4, n.2). Respondent also repeatedly refers to the peer grading of "exams," even though it is undisputed that no teacher at the Owasso School District utilizes peer grading to score semester exams or mid-semester (9-weeks) tests. (J.A. 33). Finally, Respondent characterizes Philip Pletan as "a special education student who was being 'mainstreamed.' " Brief of Respondents on the Merits, p. 10. In fact, the record establishes that the only special education service Philip received was 45 minutes of speech therapy once a week, and that was discontinued with Respondent's consent prior to the end of Philip's seventh grade year. (Record in the Tenth Circuit, Aplee. Supp. App. pp. 148-51, 328).

which two daily grades are recorded.[4] If the teacher records the 9 and 10 point scores, the teacher's grade book will reflect a percentage for the week for that student of ninety-five percent (95%), an "A" average. But if the teacher records the 7 and 8 point scores, the grade book will reflect a percentage of seventy-five percent (75%), a "C" average. In this situation (which the undisputed facts show to be perfectly consistent with the practices of teachers at the Owasso School District), the use of peer grading has *not* resulted in any disclosure of the contents of the teacher's grade book, because it is impossible for the class to know whether the teacher's grade book shows this student to have an "A" average, a "B" average, or a "C" average.[5] Moreover, suppose the

---

[4] As was pointed out at pp. 5-6 of the Brief for Petitioners, Respondent testified that she didn't know if it was possible to know, without actually being able to look at the teacher's grade book as the teacher recorded the scores, which scores get recorded in the grade book and which scores do not. (J.A. 14).

[5] Certainly, there will occasionally be a student who consistently scores in the same range from day to day and, by virtue of such consistency, enables his classmates to predict with accuracy his percentage or grade recorded in the teacher's grade book. But it cannot be plausibly suggested that Congress enacted FERPA with the goal of addressing that anomalous situation. Such a conclusion would force federal courts presented with a FERPA claim to examine the daily grading practices of teachers and perform mathematical calculations concerning the number of peer-graded homework, quiz, and test scores recorded by the teacher to determine if the plaintiff student's classmates could actually determine the correct grade or average as recorded in the teacher's grade book. Congress did not enact FERPA to burden federal courts with the task of overseeing and second guessing the day-to-day operations of our nation's classrooms.

teacher varies her practice from week to week, recording more daily grades in some weeks and fewer in others? Because no student knows the actual contents of the teacher's grade book, there is simply no *disclosure* in such a situation.

The same analysis shows why a teacher's grade book is excluded from the definition of education records by 20 U.S.C. § 1232g(a)(4)(B)(i) as records of instructional personnel "which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." As Respondent acknowledges, the Tenth Circuit's conclusion that grade books are not sole possession records was based solely on that court's assumption that "the grades contained in the grade books in this case are necessarily revealed to parents and students" through the practice of peer grading. Brief of Respondents on the Merits, p. 21. That factual assumption simply cannot be supported based on the record of this case. Because peer grading does *not* automatically result in the disclosure of the contents of a teacher's grade book, the fact that a teacher utilizes peer grading does not prevent the teacher's grade book from being a sole possession notes record excluded from the definition of education records by subpart (a)(4)(B)(i).

Respondent also fails to explain why Congress would have taxed schools with the onerous requirement of conducting a formal due process hearing to allow a parent to challenge the correctness of a score recorded on a 10 point homework paper if such score will have absolutely no impact on the student's ultimate grade in the course. Rather than attempt to justify such an indefensible result, Respondent misstates Petitioners' argument with regard

to the hearing right granted by 20 U.S.C. § 1232g(a)(2). Respondent characterizes Petitioners' argument as suggesting that subpart (a)(2) would "allow a student to challenge the grade he or she received from the teacher on every exam, quiz or homework assignment. . . . " Brief of Respondents on the Merits, p. 24. Respondent then asserts that the hearing granted by 20 U.S.C. § 1232g(a)(2) does not permit a hearing "to challenge the grade actually given in (sic) the student's performance." *Id.* Yet Petitioners made clear at p. 21 of their brief that they are not making the argument Respondent asserts. Rather, Petitioners question why Congress would grant a parent the right to a due process hearing to challenge the score on a 10 point math paper or spelling test that was correctly marked to indicate the student got only one answer wrong but was mistakenly recorded as crediting the student with only 8 points rather than his or her actual score of 9 points. It is absurd to suggest that Congress intended the hearing right of subpart (a)(2) to apply in such a situation. Yet Congress' use of the term "education records" in 20 U.S.C. § 1232g(a)(2) permits only one result. Either Congress did intend to grant parents the right to a due process hearing to challenge the score recorded on routine homework papers, or the Tenth Circuit interpreted "education records" far more broadly than Congress intended. Respondent's attempt to sidestep this issue rather than fairly deal with it illustrates the weakness of Respondent's position.

Respondent also fails adequately to address Petitioners' argument regarding the obligation imposed by 20 U.S.C. § 1232g(b)(4)(A) to maintain an access record of all individuals, agencies, or organizations which have

"requested or obtained access to student's education records." Respondent asserts that "[n]othing in the Tenth Circuit's interpretation of the term 'education records' would prohibit a central custodian from maintaining the access logs." Brief of Respondents on the Merits, p. 25. Yet as Petitioners noted at pp. 24-25 of their brief, subpart (b)(4)(A) expressly requires a record of access to be kept "with the education records of each student." If, as the Tenth Circuit held, the myriad routine student papers that come across a teacher's desk each day are "education records," then every teacher is the custodian of those records and has the obligation under subpart (b)(4)(A) to maintain an access record. Nothing in the text or legislative history of FERPA suggests that Congress ever contemplated burdening every teacher in the nation with this record-keeping requirement.

B. The Legislative History.

Respondent's reliance on the legislative history of FERPA is even more unavailing. Respondent contends that the Tenth Circuit's decision "comports with the purposes and objectives Congress intended to achieve" in enacting FERPA. Brief of Respondents on the Merits, p. 14. As support for this interpretation, Respondent quotes the following language from a statement by Senator McIntyre of New Hampshire regarding his understanding of the meaning of the term "education records" in FERPA:

> I would understand that intent to be that, except as provided in the definition, parents and students should have access to everything *in the institutional records* maintained for each student in the normal course of business and used by

> the institution in making decisions that affect the life of the student.

120 Cong. Rec. 39,858-39,859 (1974) (emphasis added). Senator Pell, Chairman of the Educational Subcommittee and co-sponsor of the Buckley/Pell Amendment that changed FERPA's definition of "education records" to its present form, concurred in this statement. *Id.* at 39,859.

Contrary to Respondent's suggestion, this quote refutes Respondent's arguments and shows that Congress clearly intended that FERPA apply *only* to institutional records maintained in an educational agency or institution's central records repository. More to the point, Congress simply did not intend FERPA to address the occasional embarrassment and hurt feelings that are an unpleasant but unavoidable concomitant to a child's attending school and interacting with child peers on a daily basis. Rather, the legislative history shows repeatedly that Congress was concerned only with the institutional records that follow a student and have the potential to negatively affect the student's future, particularly in connection with subsequent academic and employment opportunities.

Shortly after FERPA was enacted, the statute was amended to insert the definition of "education records" currently in effect. In the Joint Statement in Explanation of the Buckley/Pell Amendment that was placed in the Congressional Record, Senators Buckley and Pell made the following comments:

> In addition, the material subject to challenge is defined generically as "education records," eliminating the long list of illustrative examples contained in existing law. "Education records"

> are described as those records, files, documents, and other materials directly related to a student which are maintained by a school or by one of its agents. This definition is a key element in the amendment. An individual should be able to know, review, and challenge all information – with certain limited exceptions – that an institution keeps on him, *particularly when the institution may make important decisions affecting his future, or may transmit such personal information to parties outside the institution.*

120 Cong. Rec. 39,862 (1974) (Joint Statement in Explanation of Buckley/Pell Amendment) (emphasis added).

From the time the bill that would become FERPA was introduced in the spring of 1974, Congress' concern and focus was on *institutional records,* because it is those records that have the potential to adversely affect a student's educational and career opportunities. As Senator Buckley stated in explaining the need for a federal law guaranteeing parents the right of access to their children's education records:

> When parents and students are not allowed to inspect school records and make corrections, numerous erroneous and harmful material can creep into the records. Such inaccurate materials can have devastatingly negative effects on the academic future and job prospects of an innocent, unaware student.

120 Cong. Rec. 14,580 (1974).

Congressman Jack Kemp of New York expressed similar thoughts in remarks made in the House of Representatives about the kind of harm with which Congress was concerned:

> [T]here is growing concern about the potential abuse and improper disclosure of information now maintained and used by the public and private school systems throughout the country – extensive information on the social and economic background, attitudes and behavior, performance and ability, and health of pupils within those systems. . . .
>
> *Because the information stored in these elaborate systems follows the student as he or she goes through the learning process, from one teacher to another, from one school to another, often from one school system to another,* and because this information is subjective and involves the most sensitive of data which can be ascertained about an individual, we must come to grips with the potential abuses which can arise from the disclosure of this information. In many, if not most instances, *this information is available to such diverse entities as the military services, actual or potential employers, and institutions of higher learning.*

120 Cong. Rec. 9,633 (1974) (emphasis added).

It is difficult to imagine any circumstance in which the score on a 10 point homework paper could have "devastatingly negative effects on the academic future and job prospects" of a student, the concern specifically addressed by Senator Buckley. Likewise, it is hard to understand how Congress could have been concerned about the scores on routine homework papers, quizzes, and tests following a student from school to school and being made available to the military services, actual or potential employers, or institutions of higher learning.

FERPA was intended to govern only those institutional records that follow a student through his or her

educational career and might have an adverse impact on the student's subsequent educational or employment opportunities. The Tenth Circuit's analysis expands FERPA far beyond what was contemplated by Congress. The Tenth Circuit's decision should be reversed.

3. The Analysis of the Tenth Circuit Needlessly Burdens Legitimate Educational Practices in Ways Never Intended by Congress.

Citing *Belanger v. Nashua, New Hampshire, Sch. Dist.*, 856 F. Supp. 40, 49 (D. N.H. 1994), Respondent argues that the Buckley/Pell Amendment, which did away with the "laundry list" of representative "education records" in favor of the current definition of the term, reflects a Congressional intent to fashion a "broad definition" of education records. Brief of Respondents on the Merits, pp. 18-19.[6] Yet after urging this Court to adopt this "broad definition" of education records, Respondent sanguinely asserts that adopting the Tenth Circuit's analysis would have no negative consequences for education.[7] *Id.* at 35.

---

[6] Respondent ignores the comment from the Joint Statement in Explanation of the Buckley/Pell Amendment in which Senators Buckley and Pell state that the hearing right of 20 U.S.C. § 1232g(a)(2) was intended only to provide a procedure "to challenge the accuracy of institutional records. . . . " 120 Cong. Rec. 39,862 (1974).

[7] The breadth of the definition Respondent asks this Court to approve and the fallacy of Respondent's assurance that education will not be negatively impacted thereby are both illustrated by the fact that under FERPA, students are not granted a right of access to their *own* education records until they reach the age of 18 or are enrolled in an institution of post-

Surprisingly, Respondent does not attempt to refute Petitioners' suggestion that the Tenth Circuit's analysis would result in a FERPA violation every time a teacher corrects personally-identifiable student work done at a chalkboard in a classroom. *Amicus* Eagle Forum Education & Legal Defense Fund does address this situation, however, and argues that personally-identifiable student

---

secondary education. 20 U.S.C. § 1232g(d). Thus, under the plain language of FERPA, a student under the age of 18 may access his or her permanent transcript and the IQ tests, standardized test scores, and other materials maintained in the student's cumulative folder *only* if his or her parent consents. Accordingly, if routine homework papers, quizzes, and tests are "education records" protected by FERPA, a teacher could not return graded student work to the student without first obtaining parental permission to do so. "As students are not listed as persons who can access education records without parental permission . . . schools will certainly need that permission in order to pass various assignments and tests back to the student." Dinger, *Johnny Saw my Test Score, so I'm Suing my Teacher: Falvo v. Owasso Independent School District, Peer Grading, and a Student's Right to Privacy under the Family Education Rights and Privacy Act*, 30 JOURNAL OF LAW & EDUCATION 575, 599 (October, 2001). Given the concerns about psychological harm and self esteem voiced by *Amici* Council of Counseling Psychology Training Programs, *et al.*, it is certainly plausible to assume that some parents might choose not to subject their children to the embarrassment and humiliation of learning that he or she made a "C" or "D" on a homework paper, test, or report card. Under the analysis urged by Respondent and her *Amici*, a parent could effectively foreclose a teacher from returning *any* graded materials to a student. Congress cannot possibly have intended this result. If a teacher cannot reveal to a student that student's own mistakes, how is the teacher to instruct that student?

work on a chalkboard that a teacher has publicly corrected is not "maintained" because it is erased. Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund in Support of Respondent, p. 12. This position flies in the face of the Tenth Circuit's conclusion that a peer-graded homework paper is "maintained" by the student who scores the paper, regardless of whether the score thereon is ever recorded in the teacher's grade book.

Eagle Forum E&LDF also asserts that the Tenth Circuit's analysis will have no effect upon team grades, in-class presentations, or display of science projects and art work. *Id.* Yet Eagle Forum E&LDF offers nothing to support this argument beyond its own conclusory statement.

Commentators who have written about the Tenth Circuit's decision do not agree that the Tenth Circuit's analysis will not have a significant and adverse impact on legitimate educational practices. A thorough discussion of the problems generated by the lower court's decision is found in an article by Daniel R. Dinger in the October, 2001 issue of the *Journal of Law and Education*. Mr. Dinger notes that the negative effects of the lower court's decision include "an increased burden on teachers coupled with fewer opportunities for students to learn." Dinger, *Johnny Saw my Test Score, so I'm Suing my Teacher: Falvo v. Owasso Independent School District, Peer Grading, and a Student's Right to Privacy under the Family Education Rights and Privacy Act*, 30 JOURNAL OF LAW & EDUCATION 575 (October, 2001). Quoting a Salt Lake City, Utah, newspaper editorial, Mr. Dinger observes:

> "There are sound, practical reasons that public school students grade one another's classroom assignments and tests. Peer review can help

> budding writers improve their mastery of the language. In math classes, peer grading might help a struggling student better understand a problem solving strategy. [And] it can curb cheating." Others feel that "[p]eer corrections provide immediate feedback and help students immediately fix errors instead of repeating them until the teacher gets a chance to correct simple daily assignments." Clearly some will argue that when students are not permitted to correct other students' tests and papers, they will miss out on these important learning opportunities.

Another negative effect on student learning that may potentially result from the *Falvo* decision is that, as a result of the overburdening of teachers, students will be given fewer assignments, and therefore fewer opportunities to apply what they have learned. For example, at least one teacher has suggested that "the ruling could lead teachers to revert to less rigorous, scannable, multiple-choice tests or assign less work in order to get through it all."

> *Id.* at 597-98 (footnotes omitted).

Mr. Dinger also suggests that Respondent's blithe assurance that teachers may continue to utilize peer grading by obtaining parental consent or utilizing anonymous codes is misplaced:

> [W]hat if one or two parents sharing Kristja Falvo's concerns choose not to sign the permission slip? What should teachers do then? In such a case, a teacher would most likely have to abandon peer grading altogether, devise and maintain a code system, or run a dual grading system in which one or two students' papers are graded in some way different from the rest of

> the class. And to protect those students who do not participate in peer grading from possible ostracism, she would have to do so in a way that prevents other students from finding out who is and who is not participating in peer grading. . . . Creating codes for each student such that papers can be anonymously graded will likely result in similar administrative difficulties as, at the very least, a teacher will have to go through the process of assigning undecipherable code names or number to each student and afterwards work to make sure that students do not find out other students' code names or numbers.

Id. at 596-97. Professor Perry A. Zirkel, Iacocca Professor of Education at Lehigh University, has expressed similar concerns about the administrative burdens of implementing a system of anonymous peer grading or obtaining parental consent. Zirkel, *A D-Grading Experience?*, PHI DELTA KAPPAN, November 2000, p. 253.

Finally, Mr. Dinger notes that "perhaps the most significant effect of *Falvo* is the fact that the decision subjects teachers and administrators to potential lawsuits when one student by accident or otherwise views another student's grades." Dinger, *Johnny Saw my Test Score*, 30 JOURNAL OF LAW & EDUCATION at 596. Mr. Dinger correctly observes that the effect of the Tenth Circuit's decision was to make it "clearly established" law within the Tenth Circuit that FERPA protects the confidentiality of routine school work, thus depriving teachers and administrators in all such future cases of the defense of qualified immunity. Should this Court adopt the analysis of the Tenth Circuit, the result will be the same all across

the nation. As Mr. Dinger cautioned, teachers and administrators would be compelled "to watch every move they make in the classroom lest some student sees another's paper and a lawsuit is subsequently filed." *Id.* at 600.

The analysis of the lower court, if adopted by this Court, will unquestionably result in the *federalization* of education in the guise of protecting student privacy rights under FERPA. Federal courts will be asked to evaluate and oversee the daily activities in the classrooms of our nation's schools – both public and private – notwithstanding this Court's repeated warning that educational policy decisions are best left to local educational professionals.[8]

The appropriateness of peer grading is precisely the kind of issue that should be left to local educational decisionmakers to determine. As *Amici* National Education Association and the American Federation of Teachers, AFL-CIO observe in their *Amicus* brief supporting Petitioners, the practice of peer grading is not universally embraced by all teachers and all school districts: that is precisely the point. "The question of whether to engage in this practice – and, if so, when and to what extent – is uniquely suited to local resolution by teachers and school districts on a case-by-case basis." Brief for the

---

[8] "By and large, public education in our Nation is committed to the control of the State and local authorities." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). "The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members. . . . " *Wood v. Strickland*, 420 U.S. 308, 326 (1975).

National Education Association and the American Federation of Teachers, AFL-CIO as Amici Curiae Supporting Petitioners, p. 11.

In enacting FERPA, Congress did not intend to take this quintessentially local decision out of the hands of education officials who are responsive to the local voters. The decision of the Tenth Circuit is wrong and should be reversed.

CONCLUSION

For the reasons set forth in this brief, the Brief for Petitioners, and the briefs of the *Amici* supporting Petitioners, Petitioners request that this Court reverse the decision of the United States Court of Appeals for the Tenth Circuit and reinstate the summary judgment granted by the district court.

Respectfully submitted,

JERRY A. RICHARDSON
Counsel of Record
KAREN L. LONG
ROSENSTEIN, FIST & RINGOLD
525 South Main, Suite 700
Tulsa, OK 74103
(918) 585-9211

Counsel for Petitioners